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David Gashler, Dean Hall, and Donna Hall v. Robert E. Peay and Janice P. Peay : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVID GASHLER, DEAN HALL and DONNA HALL, Appellants, vs. ROBERT E. PEAY and JANICE P. PEAY, Appellees.	Case No. 20040948-CA

APPELLANTS DEAN HALL AND DONNA HALL'S REPLY BRIEF

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, HONORABLE GARY D. STOTT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

Other Sources Cited:

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PEAYS. THE COURT SHOULD REJECT THE PEAYS' INVOCATION OF "CHROMOSOME AGENCY"

A. Permission Was Never Granted to the Halls And, Therefore, the Halls Are Not Subject to the Permission Given to Smith.

The Peays assert that permission to use a road need not be given formally or by agreement in order to prevent a prescriptive easement from arising. (Appellees' Brief at p. 12). This assertion is incorrect. The Halls never received any form of permission, be it verbal or nonverbal, that they were using the road with the permission of the Peays. Norman Smith, the father Mrs. Hall, *was* originally given permission to cross a portion of Peays' land as well as to park his school bus on a portion of Peays' land. (R. at 200, ¶ 3; 230, ¶ 4; and 288, ¶ 4.) In 1973, the Halls purchased the property from Smith and have continually resided at said location. (R. at 404.) Since moving to the property in 1973, the Halls have used the access roadway continually until August, 2002, when a gate was installed by Peays. (R. at 358, ¶ 8.) During the 29-year period from 1973 through 2003, the Halls were *never* approached by the Peays about the access roadway across a portion of Peays' property, nor were they *ever* given permission by Peays to use such property. (R. at 281.)

Permission given to Smith by Peays cannot be imputed to the Halls merely because Mrs. Hall is related to Smith. The appellees, in their brief, state that the "plaintiffs also ignore the fact that at the time permissive use was given, Mrs. Hall was

a part of the Norman and Myrle Smith family and, therefore, the permissive use was not passed by reason of passage of title but by reason of the permission given to the Smith family." (Appellees' brief, p. 15.) The Peays thus assert agency by chromosome. There is no such thing. In Homer, et al. v. Smith, et al., 866 P.2d 622 (Utah 1993), the Court specifically rejected the argument that the presumption of permission arises because two parties enjoyed a "close family relationship." Homer cited the case of Richins v. Struhs, 412 P.2d 314 (Utah 1966) in rejecting the notion that a family or relative relationship could create a permissive use. The court, in rejecting the trial court's analysis that the parties were relatives and that a driveway was used harmoniously without conflict and was permissive (and therefore did not give rise to a prescriptive right-of-way), stated that "the difficulty with this view is that it does not give effect to fundamental principles applicable to prescriptive rights." Id. at 315. In concluding its analysis, the court held that "in order for the use to have been permissive, it would have to appear that the parties understood that the driveway was upon the Whipple's (defendant's predecessors) property; that it was with this understanding that they gave their consent to its use; and similarly, that the Joneses (plaintiffs' predecessors) so understood and accepted and used it." Id. at 316.

A same or similar analysis applies here. In order for the use to be permissive, the Halls and the Peays would need to understood that the accessway was on the Peays' property, that it was with this understanding that the Peays gave their consent

to its use, and that the Halls understood and accepted and used it in such a manner. But the facts do not indicate that any permission was given. The facts do not indicate that the Halls were using the accessway by way of permission. The facts do not indicate that the Peays consented to the Halls' use of the access road. Rather, what the facts do indicate is that the access road was used by the Halls in an adverse fashion since the Halls moved to the location in 1973. Therefore, permission was never granted to the Halls by the Peays, and any inference that permission flowed through Smith to the Halls because of the familial relationship should be rejected.

B. Permission Was Never Granted to the Halls and Therefore the Use Became Adverse Once the Halls Moved to the Location in 1973.

The Peays assert that the Halls have failed to establish a point at which the licensees' use became adverse. (Appellee's Brief at p. 14). It is the Halls' contention that they were never given permission to use the property, thus never to be considered as licensees. Rather, the record clearly reflects that permission was given to Smith, the father of Mrs. Hall, and never to the Halls.

Although the initial use by the Smiths may have been permissive, that permission ceased when the property was transferred.

> A permissive use necessarily terminates when the licensor dies or alienates the servient estate. The grant of permission being personal to him, it cannot continue beyond his termination of ownership.
>
> [A] change in the title and ownership of the alleged servient estate operates as a revocation of a permissive use previously granted and

> such use may then become adverse and ripen into an easement.
> (Footnote omitted.) 2 Thompson on Real Property § 345, at 241-42 (1980).

Granston v. Callahan, 52 Wash. App. 288, 295-296, 759 P.2d 462, 466 (1988). In that case, two brothers purchased adjoining lots and each treated the other's property as his own. One brother built buildings that encroached on the other brother's property. The buildings and property were transferred to the daughter of the one brother, and the son of the other brother sued to quiet title. The court held the use was permissive during the lives of the brothers, but that the use after title was transferred was adverse.

Similarly, in this case any permission given to the Smiths terminated when the property was convey to the Halls. Because the Halls never received permission, it follows that the use of the roadway by Halls was adverse. This adverse use began at the time of the purchase of the property in 1973. The Halls did not know the original use was permissive. Therefore, the burden is not on the Halls, as they are not licensees, rather, the law provides that "when a claimant has shown that such a use has existed peaceably and without interference for the prescriptive period of 20 years, the law presumes that the use is adverse to the owner." Richins, 412 P.2d at 315. The adverse use began when the Halls purchased and began using the property.

C. Use of the Access Roadway by the Halls Did Not Constitute a Neighborly Accomodation.

Just as the Halls never received permission nor was permission given to them by the Peays, the Peays never exercised any neighborly accommodation to thereby thwart any efforts by the Halls to obtain a prescriptive easement. The appellees, in their brief, rely on the unfounded presumption that regardless of the relationship of the Halls to Smith, any permission or neighborly accommodation precludes the rising of a prescriptive easement. This point has no legal basis or validity. It has been pointed out by several courts that "the fact that the parties (predecessors) were friendly or even cordial with each other as they appear to have been, it does not prevent a prescriptive right from coming into being." Richins, 412 P.2d at 316; see also Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); Green v. Stansfield, 885 P.2d 117, 120 (Utah Ct. App. 1994). The Halls' use of the access roadway never arose from permission given to Smith, nor was it ever based on any neighborly accommodation between themselves and the Peays. Thus, the simple fact that Smith and Peays were friendly and cordial should not prevent a prescriptive right from arising on behalf of the Halls. All that is required is to show that the use was in fact adverse and appeared to be so. Richins, 412 P.2d at 316.

Further, if such agreement or neighborly accommodation or permission was ever granted, it was granted to *Smith* not the Halls. Halls' use of the road began in 1973 and continued with the knowledge of the Peays until 2002. The Peays knew that

a portion of their property was being used by the Halls, and such use was plainly apparent. (R. at 270).

Even if the Court finds that permission was granted to the Halls, or that a neighborly accommodation did occur so as to allow access of a roadway by the Halls, such permission or neighborly accommodation is invalid because the Peays never had title to the property by which they were giving permission or granting a neighborly accommodation. Title to the roadway was not gained by the Peays until 1992.

II. ACCESS TO THE ROADWAY WAS NOT INTERRUPTED REGULARLY THEREBY PRECLUDING ANY CLAIM TO THE 20-YEAR PERIOD OF UNINTERRUPTED USE.

It is the Peays' contention that regular routine maintenance on the road which was done every three to four years constituted an interruption significant enough to thwart the 20-year prescriptive period of the Halls. The deposition testimony of Robert Peay indicates that the only road closure mentioned in 1987 was for the purpose of asphalting, slurring, and resurfacing his own personal driveway and the access road. This deposition was taken on October 21, 2003. On December 12, 2003, Robert Peay submitted an affidavit apparently to clarify his deposition testimony by stating that the purpose of the periodic closures of the access over his property was so that the general public could not establish any rights to cross his property, thereby thwarting any right to a prescriptive easement. (R. at 203, ¶¶ 2 and 3.) Nowhere else in the record is there any indication that the Peays closed off the access road with the

intent of stopping any potential prescriptive easement. There is also no other indication in the record, other than the 1987 closure, that the road was closed to stop any potential prescriptive easement.

The deposition testimony of Robert Peay was never amended to indicate his true and apparent purpose of closing the road. Rather, a subsequent affidavit was submitted apparently attempting to expound on the deposition testimony. Rather than expound the deposition testimony, the affidavit contradicts the original deposition testimony. He told the truth in his deposition, and backtracked in the affidavit. The Court may consider the credibility of testimony offered in support of summary judgment, and, indeed, this may in itself pose a factual issue sufficient to defeat summary judgment. Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983).

The appellees further go on to cite in their brief how Brigham Young University[1] effectively blocks its roads for one day a year so as to potentially prevent a prescriptive easement from arising. The clear difference between Brigham Young University and the Peays is that it is the *intent* of Brigham Young University to close the roads and thereby prevent any prescriptive easement from arising. The intent of the Peays in 1987 in blocking the road for maintenance purposes appears to be

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[1]No where in the record is there any indication as to the validity the appellee's statements about Brigham Young University and there need to shut off their roads to prevent a prescriptive easement from arising. There is no indication in the record from any Brigham Young University representative that purpose of blocking off its roadways is to stop a prescriptive easement from arising.

specifically for maintenance purposes. It was not until 2003, following deposition testimony, that any "clarification" was given as to why the roadway was blocked.

Intent of the owner is a necessary requirement in determining whether use is to be considered interrupted or uninterrupted. Courts have recognized that "[t]o be interrupted an obstruction must interrupt the actual use and the obstruction must be accompanied by an *intent* to cause an interruption in use." Keefer v. Jones, 359 A.2d 735, 738 (Penn. 1976), citing Margoline v. Holefelder, 217 A.2d 227 (1966). In discussing the defendant's conduct in the blockage of a roadway the Court held that "the inference to be drawn from defendant's own testimony is that whatever interference to the plaintiffs' use of the area may have resulted from defendant's operations was temporary and was not an unambiguous act evincing an *intention* to exclude the plaintiffs from their uninterrupted use of the area." Red Star Yeast and Products Co. v. Merchandising Corp., 4 Wis.2d 327, 335, 90 N.W.2d 777 (1958), *italics added.* Also "[m]ere intermission is not interruption." Verh v. Morris, 410 Ill. 206, 212, 101 N.E.2d 566 (1951).

In Wypchoski v. Berg, 1998 WL 88313 (Conn.Sup.Ct.1998), the court held that closing of easement once a year for 24-hours for application of blacktop followed by immediate resumption of use by claimant did not interrupt adverse use.

If it was the intent of the Peays to block the roadway specifically for maintenance purposes, such maintenance purposes did not rise to the level of

interrupting the use of the Halls and the public. The Halls continued to use the roadway after the maintenance was completed. The record does not indicate that the Peays had the requisite intent. The Halls have never had to fight, scramble or dispute their access of the roadway. The Peays did not have the original intent to interrupt the use of the Halls, and such intent cannot arise after the fact. Also, the Peays did not own the road which they were closing off. The facts demonstrate that the Peays likely owned only a portion of the road when they were closing it.

III. THE HALLS HAVE MET THE REQUIREMENTS FOR A NEW TRIAL UNDER THE BASIS OF NEWLY DISCOVERED EVIDENCE PURSUANT TO RULE 59.

The Peays assert that the Halls were in possession of the purported "new" evidence from the commencement of the litigation. (Appellee's Brief p. 24). On May 18, 2004, oral arguments were heard by the court on the cross-motions for summary judgment. The court entered a Memorandum Decision dated May 24, 2004. On June 17, 2004, the Findings of Fact and Conclusions of Law and Judgment were filed and signed by the Honorable Gary D. Stott. Pursuant to Rule 59 of the Utah Rules of Civil Procedure, the Halls moved the court for a new trial based on newly discovered evidence obtained by them following the hearing on the cross-motions for summary judgment.

At the time of the hearing on the cross-motions for summary judgment, the Halls had no survey or title information which would have confirmed the fact that the

Peays did not own the property over which they claimed to give permission. If the Peays do not own the subject property, or only own a portion of the subject property, no permission can be granted, nor can a prescriptive right be stopped by the Peays.

Throughout the course of the litigation, the access roadway has been commonly referred to as the Peays' property. In the Peays' Memorandum in Support of Motion for Summary Judgment, they state that they purchased the property on which their home and the area of permissive use lie in 1969. (R. at 230, ¶ 1.) Peays state that in 1969 they gave Norman Smith and his family permission to cross the front part of his property so that Norman Smith and his family could have more convenient access to their property than their legal access. (R. at 230, ¶ 4.) Peays further state that since purchasing the property in 1969, they have closed off access to the Halls' property from Peays' property on the south so that no prescriptive easement could arise. (R. at 229, ¶ 8.) Further in their memorandum the Peays argue that in 1987 Craig Bybee of Bybee Excavation and Asphalt completely resurfaced and asphalted the "defendants' road." (R. at 229, ¶ 10.) The property is commonly referred to as "his [Peay] property" and "defendant's property." Throughout the course of the litigation, all references made to the access road by the Peays and the Halls were made presuming the access road belonged completely to the Peays. All references made in the record clearly indicate that Peay was the owner of the property from the original purchase of his property in 1969. The question is whether the Halls, as ordinary people, have an

obligation to expend a considerable sum of money on a survey report which, by all indications, would be meaningless absent the knowledge that the property was not owned by the Peays until 1992. It is clear from the record that the Halls relied on the Peays' representations to their detriment, and that granting of a new trial is appropriate under the circumstances. Furthermore, the facts of this case are not that of a normal easement dispute where a boundary line is in question. Rather, the facts demonstrate that the key question appears to be one of permission. Nothing in the facts of the case pointed to the need to conduct a boundary line survey. This is not a standard boundary line disagreement where a survey is vital to the dispute. It was not until after the hearing on the Motions for Summary Judgment that a boundary issue was ever presented. Given the facts known to the Halls prior to the hearing, a property survey in this prescriptive easement case would have useless.

It is the Peays' contention that the plaintiffs were in possession of the newly discovered evidence or deed from the commencement of the limitation and, therefore, said deed cannot be considered newly discovered evidence. The test, however, is (1) whether the existence of newly discovered evidence is material and competent, (2) that by due diligence the evidence could not have been discovered or produced before trial, and (3) that the evidence is not merely cumulative or incidental but is substantial enough that with the evidence there is a reasonably likelihood of a different result. Promax Development Corp. v. Mattson, 943 P.2d 247 (Utah Ct. App. 1997). Points 1

and 3 of the three-prong test are met in that the newly discovered evidence is clearly material and competent, and that it is not cumulative or incidental and also could have a substantial impact producing a completely different result. If the newly discovered evidence is admitted and a new trial is granted, there is a substantial likelihood, based on the survey reports, that a fact finder would find that the Peays did not own the property over which they gave Smith permission to use, or in their attempt to close the road for maintenance purposes. Without ownership of the road, the prescriptive period would continue to run, thereby allowing the Halls a prescriptive easement on the access roadway.

The question that remains is whether the Halls used due diligence in discovering the evidence prior to trial. The record specifically demonstrates that the Halls had no idea as to the legal significance of the deed or as to the exact location of the deeded property in 1992. It was not until a survey was completed after the decision on the cross-motions for summary judgment was issued that such knowledge of the access roadway was obtained. It is the appellees' argument that due diligence required the Halls to have the property surveyed prior to trial. The ultimate question is whether due diligence requires the Halls to obtain a survey of the deeded property prior to trial without knowing the location of the actual deeded property and given the factual representations of the Peays throughout the litigation and discovery process.

The Supreme Court has stated that to "entitle a party to a new trial on the ground of newly discovered evidence, it must appear (1) that he used reasonable diligence to discover and produce such evidence at the former trial and that his failure was not due to his own negligence . . . (5) that the defeated party had no opportunity to make the defense or was prevented from so doing by unavoidable accident or the fraud or improper conduct of the other party." Kloppenstein v. Hayes, 57 P. 712 (Utah 1899).

Not only are the interests of justice satisfied if a new trial is granted, but there is little, if any, prejudice which would occur to the Peays. The deed and the location of the deed as compared to the access road are crucial issues which have not been significantly addressed and would clearly have a substantial bearing on the outcome of the current litigation. The Halls used reasonable or due diligence in handling themselves throughout the course of the litigation as based on the facts presented to them by the Peays that the Peays owned 100% of the access road. The Halls should not be forced or punished to spend a considerable sum of money on a survey because of their complete reliance upon the representations of the Peays throughout the course of litigation. Therefore, the lower court's ruling on the motion for new trial should be reversed.

CONCLUSION

The facts clearly demonstrate that permission was never given to the Halls. The family relationship does not impute permission or a neighborly accommodation to the

Halls from the Peays. Also, the Peays' routine maintenance on the roadway is not sufficient to stop a prescriptive easement from arising given the original intent of the Peays. Finally, the Halls are extremely prejudiced if the newly discovered evidence is not permitted. The Peays did not own the land over which they apparently granted permission and, therefore, a prescriptive easement should arise in favor of the Halls.

DATED this 28th day of June, 2005.

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 28th day of June, 2005.

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